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FEDERAL COMMUNICATIONS COMMISSION  
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May 3, 1993

Ms. Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

92-2951

Re: Petition for Reconsideration (MM Docket No. ~~92-259~~; 47 C.F.R. §1.429)

Dear Ms. Searcy:

Enclosed with this letter is a Petition for Reconsideration of the Commission's decision to redesignate the Columbus market as "Columbus/Chillicothe." The Petition is filed on behalf of Outlet Broadcasting, Inc., (licensee of WCMH-TV).

The Petition is being filed with a facsimile signature. However, pursuant to the terms of 47 C.F.R. §1.52, the undersigned shall retain the original until the Commission's decision in this matter is final and no longer subject to judicial review.

Should you have any questions regarding this matter, please contact the undersigned.

Sincerely,

HORACK, TALLEY, PHARR &amp; LOWNDES

  
Russell J. Schwartz

RJS/dsw  
Enclosure

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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MAY - 3 1993

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	FEDERAL COMMUNICATIONS COMMISSION
Act of 1992	)	OFFICE OF THE SECRETARY
	)	MM Docket No. 92-259
Broadcast Signal Carriage Issues	)	DOCKET FILE COPY ORIGINAL
	)	
Reexamination of the Effective	)	
Competition Standard for the	)	MM Docket No. 90-4
Regulation of Cable Television	)	
Basic Service Rates	)	
	)	
Request by TV 14, Inc.	)	
to Amend Section 76.51 of the	)	MM Docket No. 92-295
Commission's Rules to Include	)	RM-8016
Rome, Georgia, in the Atlanta,	)	
Georgia, Television Market	)	
To: The Commission		

PETITION FOR RECONSIDERATION

Outlet Broadcasting, Inc. ("OBI"), licensee of WCMH(TV), Columbus, Ohio, by its counsel and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429 (1992), hereby seeks reconsideration of the Commission's recent decision in the above-referenced proceeding to change the designation of the Columbus, Ohio television market in Section 76.51 of the Commission's rules, 47 C.F.R. § 76.51 (1992), from "Columbus" to "Columbus-Chillicothe."<sup>1</sup> Because this action was taken without sufficient notice to interested parties and was consequently based on a patently inadequate record, OBI urges that it be reconsidered and reversed. If the Commission had provided statutorily sufficient notice, it would have been inundated with evidence demonstrating

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<sup>1</sup> Report and Order (MM Docket Nos. 92-259 et al.), FCC 93-144, released March 29, 1993 ("Report and Order"), at paragraphs 48-50. This decision was published in the Federal Register on April 2, 1993. 58 Fed. Reg. 17,350.

that the Columbus and Chillicothe television markets are indeed separate and distinct and do not exhibit the "commonality" that the Report and Order states is necessary for such changes.<sup>2</sup> As a consequence, OBI urges the Commission to reverse this one aspect of its Report and Order and issue a Notice of Proposed Rulemaking so interested parties may comment on any change in the designation of the Columbus market.

The above-referenced proceeding, MM Docket No. 92-259, began with the issuance of a Notice of Proposed Rule Making ("NPRM") on November 19, 1992,<sup>3</sup> shortly after Congressional adoption of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").<sup>4</sup> In the 1992 Cable Act, Congress specifically ordered the FCC to adopt rules to implement the Act's must carry and retransmission comment provisions. Included among the specific actions the FCC was directed to undertake was a review of Section 76.51 of the Commission's rules, which lists the 100 largest television markets and their designated communities.<sup>5</sup> This "Top 100 Market List" primarily affects determination of copyright liability under cable television's compulsory license but also affects operation of the Commission's territorial exclusivity, syndicated exclusivity, and network nonduplication rules.

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<sup>2</sup> Report and Order at paragraph 50.

<sup>3</sup> Notice of Proposed Rule Making (MM Docket No. 92-259), 7 FCC Rcd 8055 (1992).

<sup>4</sup> Pub. L. No. 102-385, 1992 U.S.C.C.A.N. (102 Stat. 1460) (to be codified in various sections in 47 U.S.C.).

<sup>5</sup> 47 U.S.C.A. § 534(f) (1993).

In the NPRM, the Commission explained that the Section 76.51 list, which was codified in 1972, had been based principally on Arbitron's 1970 list of prime time household rankings.<sup>6</sup> Since many television markets have changed since 1970, the NPRM requested comment on suitable criteria for revising the list. The NPRM set forth a number of general, industry-wide questions regarding the list for which the Commission requested answers.<sup>7</sup> The breadth of the questions indicated that the Commission was

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The Commission stated that it would consider future revisions to the list on an ad hoc basis using an expedited rulemaking procedure.<sup>12</sup> Under this approach, the Commission said it would issue a notice of proposed rulemaking based on a

than the proponent of the change.<sup>15</sup> Even in that case, however, the Commission declined one commenter's additional request to include Athens, Georgia in the market name, explaining that the proposal had not been the subject of the NPRM in that particular docket. The Commission stated that it would consider the Athens request if the proponent petitioned to initiate a proceeding to consider the issue.<sup>16</sup>

By contrast, the addition of Chillicothe to the Columbus market designation change was made without any published notice or public indication from the Commission that it was contemplating the change. Without any such indication, the Commission understandably received no oppositions or comments on the idea. The only document in the record in MM Docket No. 92-259 concerning the Chillicothe modification was a two-page request for the change that was filed by the amendment's proponent, Triplett and Associates, Debtor-in-Possession ("Triplett"), licensee of WWAT(TV) in Chillicothe, Ohio. The two-page request incorporated by reference two earlier and, by then, very stale filings, one of which was almost five years old. (The other had been in the Commission's files for eighteen months.) In a very brief attachment, Triplett supplied an extremely minimal, "bare bones" update of a few of its earlier data. To the best that OBI can ascertain, the Commission had never issued a public notice concerning

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<sup>15</sup> In the Atlanta proceeding, five parties, including the proponent of the change, filed comments. Given its decision to

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either of these earlier filings.<sup>17</sup> The Commission reported the filing of the two-page request in a public notice of comments received in this docket; however, the notice listed only the petitioner's name as one of many filers and gave absolutely no indication that the comments sought a change in designation of the Columbus market.<sup>18</sup>

Sufficient notice and description of a proposed change are statutory requisites of the Commission's process.<sup>19</sup> As judicial authorities have noted,

The adequacy of notice is a critical starting point which affects the integrity of an administrative proceeding. Notice is said not only to improve the quality of rulemaking through exposure of a proposed rule to comment, but also to provide fairness to interested parties and to enhance judicial review by the development of a record through the commentary process.<sup>20</sup>

As demonstrated here, adequate notice is essential to generate debate and create a thorough record on which a Commission decision can be based. The NPRM in this case cannot be said to have given the parties notice that the Commission was consid-

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<sup>17</sup> The only public FCC reference to any earlier filings by Triplett concerning the Chillicothe change appears in an obscure footnote in a Further Notice of Proposed Rule Making in an entirely different docket that had been initiated in 1988. See Further Notice of Proposed Rule Making (Gen. Dkt. No. 87-24), 3 FCC Rcd 6171, 6176 n. 15 (1988).

<sup>18</sup> FCC Filings, Mimeo No. 31317, Jan. 15, 1993, at 1.

<sup>19</sup> 5 U.S.C. § 553(b) (3).



ering changes in particular markets. In fact, to the contrary, the NPRM said such specific changes would take place in separate proceedings and at least two such proceedings were initiated while the comment period in this docket was still open. Interested parties had no idea that the Commission was considering the addition of Chillicothe to the Columbus designation. As a result, it received no comments on the subject, and its decision was based on information and data in its files that was as much as five years old and that had never directly been addressed in comments from other parties. Faced with a similar lack of notice concerning the proposed Athens, Georgia change and a lack of comments exploring that subject, the Commission chose to defer taking action. There, the Commission had only the information submitted in January 1993 by the change's proponent. In the case of Chillicothe, the Commission had less -- a stale and unvetted record -- but took the action anyway.

The fact that the Chillicothe proponent took advantage of the Commission's announcement of its generalized review of Section 76.51 and resubmitted its old comments cannot be deemed in any way to satisfy the agency's obligation to provide satisfactory notice. Specific and adequate notice must come from the agency itself. In a similar context, the District Court of Appeals for the District of Columbia Circuit has stated,

Neither can we properly attribute notice to the other appellants on the basis of an assumption that they would have monitored the

essarily must come -- if at all -- from the agency."<sup>21</sup>

Comments from one interested party which noticed a nexus to a proposal it had previously made do not make up for the agency's failure to give sufficient notice.<sup>22</sup>

To comply with its statutory responsibilities and ensure that rule amendments are premised on a well-supported record, it is essential that the Commission remove the modification of the Columbus market from among the changes adopted in MM Docket 92-259 and issue a Notice of Proposed Rule Making to explore the question of adding Chillicothe to the Columbus market designation. Only with such action will the Commission act consistently with its statement in the NPRM in this docket that individual market revisions would be handled through separate proceedings and with its decision not to add Athens to the Atlanta market designation based on the fact that the change had not been the subject of a Notice of Proposed Rulemaking.

If the Commission had given adequate notice that it was contemplating adding Chillicothe to the Columbus designation, it would have received abundant evidence demonstrating that Chillicothe is indeed a separate and distinct market from

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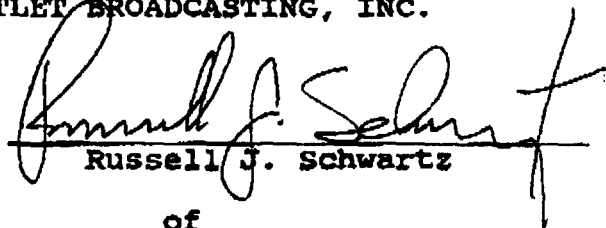
straits are really the fault of Commission regulation rather than the licensee's own mismanagement and failure to program the station in a manner that appeals to even its home-community viewers.

Accordingly, Outlet Broadcasting, Inc. urges the Commission to reverse its decision to amend Section 76.51 of its rules to change the Columbus market designation from "Columbus" to "Columbus-Chillicothe" and requests that the Commission issue a Notice of Proposed Rule Making so that interested parties may comment and the proposal may be considered on a well-developed record.

Respectfully submitted,

OUTLET BROADCASTING, INC.

By

  
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of

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Its Attorneys

May 3, 1993

**CERTIFICATE OF SERVICE**